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No. 89-352

In the

Supreme Court of the United States

October Term, 1989

MAURICE SILVERSTEIN,

Petitioner,

- against -

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROBERT M. MORGENTHAU
District Attorney
New York County
Attorney for Respondent
One Hogan Place
New York, New York 10013
(212) 553-9000

MARK DWYER
PATRICIA CURRAN
ASSISTANT DISTRICT ATTORNEYS
Of Counsel

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES i

PRELIMINARY STATEMENT 1

QUESTIONS PRESENTED 2

1. GIVEN THAT THE POLICE HAD PROBABLE CAUSE TO SEARCH PETITIONER'S APARTMENT AND THAT THE COURT AUTHORIZED THE NIGHT ENTRY IN THE SEARCH WARRANT, DID THE FOURTH AMENDMENT PROHIBIT THE OFFICERS FROM EXECUTING THAT WARRANT IN ACCORDANCE WITH ITS TERMS? 2

2. GIVEN THAT THE COURT EXPRESSLY FOUND THAT THE DETECTIVES' DECISION TO OBTAIN THE SEARCH WARRANT WAS NOT AFFECTED BY THE EARLIER SEARCH, DOES PETITIONER HAVE GROUNDS TO COMPLAIN THAT THERE WAS NO SUCH FINDING? 2

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT 8

CONCLUSION 14

TABLE OF AUTHORITIES

CASES	PAGES
Gooding v. United States, 416 U.S. 430 (1974).....	10
Murray v. United States 108 S.Ct. 2529 (1988).....	7,11,12
O'Rourke v. City of Norman 875 F.2d 1465 (10th Cir. 1989).....	8,9,10
People v. Silverstein, 74 N.Y.2d 768 (1989).....	7,10

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MAURICE SILVERSTEIN, :

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THE STATE OF NEW YORK, :

Respondent, :

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BRIEF IN OPPOSITION TO PETITION
FOR A WRIT OF CERTIORARI

PRELIMINARY STATEMENT

Petitioner seeks a writ of certiorari to review an order of the New York Court of Appeals, dated July 11, 1989. That order affirmed a November 1, 1988, order of the Appellate Division, First Department, which in turn affirmed a May 26, 1987, judgment convicting petitioner of Attempted

Kidnapping in the Second Degree (New York Penal Law §§110.00/135.20). Petitioner is now incarcerated pursuant to that judgment.

QUESTIONS PRESENTED

1. GIVEN THAT THE POLICE HAD PROBABLE CAUSE TO SEARCH PETITIONER'S APARTMENT AND THAT THE COURT AUTHORIZED THE NIGHT ENTRY IN THE SEARCH WARRANT, DID THE FOURTH AMENDMENT PROHIBIT THE OFFICERS FROM EXECUTING THAT WARRANT IN ACCORDANCE WITH ITS TERMS?

2. GIVEN THAT THE COURT EXPRESSLY FOUND THAT THE DETECTIVES' DECISION TO OBTAIN THE SEARCH WARRANT WAS NOT AFFECTED BY THE EARLIER SEARCH, DOES PETITIONER HAVE GROUNDS TO COMPLAIN THAT THERE WAS NO SUCH FINDING?

STATEMENT OF THE CASE

This case arises from a police search of an unoccupied New York City apartment on October 7, 1986. On October 6, 1986, the day before the search, petitioner, his girlfriend and two others

kidnapped Richard Baeyen and brought him to the apartment, where petitioner resided with his girlfriend. There the four kidnappers tortured Baeyen for 18 hours, using a knife, a stun gun and handcuffs. The victim was able to escape the following morning and immediately reported the crime to the police. As a result of Mr. Baeyen's report of the crime, several uniformed officers went immediately to petitioner's apartment and, after entering with a key obtained from the building's owner, briefly searched the apartment for the kidnappers, all of whom had fled. During their search for suspects, two officers observed blood stains on a carpet inside the apartment.

Later that same day, a detective interviewed the victim and, based upon the victim's account of the crime, obtained a search warrant for the apartment. The application did not request permission for a night entry but the warrant was signed after 9:00 p.m. and the warrant itself

expressly authorized the police to enter at night. The warrant was executed sometime between 10:00 p.m. and midnight that evening. During the search of the apartment the detectives found a steamer trunk, a pair of handcuffs, blood samples from the carpet and from the couch, and a paper containing the victim's name.

Petitioner was subsequently arrested and indicted for Kidnapping in the First Degree and three counts of Assault in the Second Degree. In a motion to suppress physical evidence, petitioner challenged the validity of the search warrant used by the detectives to search the apartment for evidence. Petitioner claimed that the uniformed officers' initial entry into the apartment without a warrant was illegal, that what was found during that illegal entry -- particularly the officers' observation of the blood stains on the carpet -- tainted the later procurement of the search warrant, and also that there were insufficient

grounds in the warrant's application to allow night entry into the apartment.

In an April 7, 1986, decision, Justice Harold Rothwax determined that the uniformed officers' initial entry into the apartment was not justified by exigent circumstances, and was thus improper. However, the court further determined that the victim's account of the crime to the police provided an independent source which supplied the requisite probable cause for the search warrant. Justice Rothwax also approved the detectives' entry into the apartment at night, despite the absence in the warrant application of a statement of facts justifying such an entry. The court determined that the reviewing magistrate had approved the night entry, noting the specific direction of the warrant itself that it could be executed at night as well as the surrounding circumstances, including the evening hour that the warrant was signed and that the warrant itself

indicated it would be executed immediately. After the denial of his suppression motion, defendant pleaded guilty and was sentenced to an indeterminate prison term of three to six years.

Petitioner then appealed to the Appellate Division, First Department and argued substantially the same grounds concerning the search as he had in the lower court. In a November 1, 1988, decision, the Appellate Division, First Department, affirmed that judgment without opinion.

Petitioner next appealed to the New York Court of Appeals. There, he shifted the emphasis of his argument and focused primarily on the propriety of the night entry. He also contended that the lower court failed specifically to determine that the uniformed officers' observation of blood stains neither prompted the detectives to obtain the warrant nor influenced the reviewing magistrate to sign the warrant. In a July 11, 1988, opinion, the New York State Court of Appeals

affirmed, finding that the warrant's request for night entry and the circumstances surrounding the magistrate's signing of the warrant showed that the magistrate had approved the night entry and thus justified the detectives' execution of the warrant at night, and their subsequent recovery of the evidence. People v. Silverstein, 74 N.Y.2d 768 (1989).

Petitioner now requests that he be granted certiorari to appeal to this Court. In support of his petition for certiorari, petitioner claims that nighttime searches are per se unreasonable under the Fourth Amendment. He asserts that a night entry thus requires a showing of necessity beyond the requisite demonstration of probable cause. Petitioner also claims that the decisions of the state courts in this case are in conflict with this Court's holding in Murray v. United States, 108 S.Ct. 2529 (1988), and in particular that the lower court erred when,

according to petitioner, it did not determine whether the initial entry by the uniformed officers prompted the detectives' procurement of the warrant or affected the magistrate's approval of the warrant.

REASONS FOR DENYING THE WRIT

Petitioner first claims that a search warrant allowing a night entry requires a special showing beyond the demonstration of the requisite probable cause. However, his argument does not present an issue worthy of this Court's review. On its face the Fourth Amendment does not distinguish between nighttime and daytime searches. Moreover, petitioner relies on no case holding that a special showing is required for a night entry pursuant to a search warrant, and thus there is no conflict regarding this issue in the courts below.

Petitioner's reliance on O'Rourke v. City of Norman, 875 F.2d 1465 (10th Cir. 1989), as a

supposed example of such a conflict, is entirely misplaced. There, two officers who were looking for a defendant in a small claims proceeding conducted a night search of a home with an arrest warrant. That arrest warrant had been issued three months earlier and was not endorsed for nighttime execution. The court in O'Rourke determined that the search was improper under the Fourth Amendment because a neutral and detached magistrate had not determined the reasonableness of the nighttime search. Id. at 1475. The facts of this case are much different. Here, a magistrate in fact reviewed and approved the warrant, and, unlike the warrant in O'Rourke, that warrant included an authorization for a night entry. In addition, not only did the police here execute the warrant immediately, but they were involved in the investigation of a violent felony. The warrant application itself did not include a request for night entry or set forth particular facts

supporting such an entry, but the New York Court of Appeals held that such specifics were not necessary where, as here, the circumstances surrounding the magistrate's signing of the warrant demonstrated that the search would be conducted at night, the whereabouts of the violent-crime suspects were still unknown, and the recovery of evidence was essential to a continued police investigation. People v. Silverstein, supra. Thus, the magistrate's review of the warrant here, and the fact that the warrant contained a specific authorization for a night entry, plainly distinguish this case from O'Rourke, where the officers' night entry was completely unauthorized.

In further support of his contention that a night entry requires a special showing, petitioner relies on the dissent in Gooding v. United States, 416 U.S. 430 (1974). However, that dissenting opinion does not constitute controlling authority and thus there was no reason for the

state court to conform its opinion here to the dictates of that dissent and require that a special showing be offered to allow a night entry.

Thus, petitioner's argument that the decision of the New York Court of Appeals is at odds with the decisions of other courts is unavailing. And that is hardly surprising, for what happened here was by no means an unreasonable exercise of law enforcement authority. It was obvious that a violent crime had been committed and that the police were involved in an on-going investigation to gather evidence against the kidnappers as well as apprehend the suspects. Given the plain existence of probable cause, there was no constitutional impediment to the night entry.

As his second argument petitioner claims that the lower court was obligated under Murray v. United States, 108 S.Ct. 2529 (1988), to make specific findings in the record that the uniformed

officers' initial illegal entry had not prompted the detectives to obtain a search warrant, and that the magistrate's authorization of the warrant was not affected by the uniformed officers' observation of blood on the carpet in the apartment during the initial entry. Even assuming that Murray requires such specific findings by a suppression court, in this case the lower court made those determinations. Justice Rothwax stated:

> "Nothing observed by the officers in this case upon their initial entry into the defendant's apartment was mentioned in the affidavit. We are not confronted with a situation where the police have illegally entered a home, discovered contraband and sought a search warrant in an attempt to validate the seizure of the fruits of the illegal entry . . ." (A10) (emphasis added).

And Justice Rothwax explicitly found that the warrant was obtained solely on the basis of information obtained prior to any illegal entry. The court stated:

> "Applying the independent source rule to the facts of this case, it would be inappropriate to order suppression of the evidence which was lawfully seized pursuant to a valid search warrant based solely on the information obtained prior to an independent (sic) of the illegal entry." (A10)

As the lower court made the findings which petitioner contends should have been made, petitioner's issue is not presented by the facts of this case and should not be considered by this Court.

In sum, the decision of the New York Court of Appeals does not present any issue which conflicts with any decisions of this Court or of other appellate courts, nor does it present any issue worthy of this Court's review. Accordingly, the petition should be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ROBERT M. MORGENTHAU
District Attorney
New York County
Attorney for Respondent

MARK DWYER
PATRICIA CURRAN
Assistant District Attorneys
Of Counsel

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